IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 22, 2006

MISTY DAWN (LASHLEE) ROSE v. CHRISTOPHER STANLEY LASHLEE

Appeal from the Chancery Court for Dickson County
No. 7738-02 Leonard W. Martin, Judge

No. M2005-00361-COA-R3-CV - Filed on August 18, 2006

This appeal involves the custody and visitation arrangements concerning two adolescent girls. Less than one year after the parents' divorce, the mother filed a petition in the Chancery Court for Dickson County seeking to modify the permanent parenting plan. The father responded by seeking other modifications in the visitation provisions in the parenting plan. Following a bench trial, the trial court found that a material change in circumstances had occurred and increased the mother's visitation with the children. The father asserts for the first time on this appeal that no change of circumstances had occurred that was significant enough to warrant a modification of the parenting plan. We have determined that the father cannot take issue with the lack of evidence regarding a material change in circumstances because he failed to raise the issue in the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

David D. Wolfe, Dickson, Tennessee, for the appellant, Christopher Stanley Lashlee.

Timothy V. Potter, Dickson, Tennessee, for the appellee, Misty Dawn (Lashlee) Rose.

OPINION

I.

Christopher Lashlee and Misty Dawn Lashlee had two daughters while they were married. Their older daughter was born in October 1992, and their younger daughter in May 1995. The Lashlees separated in March 2002 and were divorced in the Chancery Court for Dickson County on July 10, 2002. The judgment approved and incorporated the parties' marital dissolution agreement, as well as a permanent parenting plan designating Mr. Lashlee as the children's primary residential parent. Ms. Lashlee was ordered to pay child support and also received defined visitation rights.

Ms. Lashlee's visitation rights included visitation from Tuesday afternoon to Wednesday morning and every other weekend from Friday afternoon through Sunday. In addition to provisions for Christmas vacation, the parenting plan divided the holidays and the children's birthdays either by alternating them every other year or by sharing equal time every holiday or birthday. The trial court also granted the parties "two (2) nonconsecutive weeks of extended summer vacation."

Ms. Lashlee changed her surname to "Rose" following the divorce.[1] In June 2003, less than one year after the parties' divorce, Ms. Rose filed a petition in the trial court alleging that a material change of circumstances had occurred that required a modification of the permanent parenting plan. She requested an order directing the parties to attempt to mediate their disagreements. If mediation proved unsuccessful, Ms. Rose requested the trial court to designate her as the children's primary residential parent and to require Mr. Lashlee to pay child support. Mr. Lashlee admitted in his response that a material change of circumstances had occurred. He also asserted that the overnight visitation on school nights with Ms. Rose had affected the children's performance in school. Therefore, he requested that the permanent parenting plan be modified by deleting Ms. Rose's overnight visitation on Tuesdays during the school year.

The trial court conducted a bench trial in August 2004. At the outset, Mr. Lashlee's lawyer informed the court that his client did not oppose Ms. Rose having more visitation with the children but that he opposed her efforts to have as much residential time with the children as he had.[2] At the conclusion of the hearing, the trial court announced revisions in the parenting plan from the bench. While the court divided the regular holidays and birthdays in essentially the same manner as the original parenting plan, the court did away with overnight visitation on Tuesdays during the school year and replaced it with visitation on Tuesdays ending at 8:00 p.m. The trial court also announced the following new visitation arrangements: (1) an equal division of the children's fall and spring vacations, (2) a modified Christmas vacation visitation schedule, (3) alternating summer visitation on two-week intervals, and (4) regular Tuesday visitation commencing at 1:00 p.m. when the children are not in school and Ms. Rose is not working. The trial court also directed the parties to change their practice of exchanging the children following visitation at 6:00 a.m. and to stop exchanging the children at the police station.

During the hearing, Mr. Lashlee did not object to the trial court's revisions to the parenting plan on the grounds that the changes were not necessary because no change of circumstances warranting them had occurred or that the revised parenting plan would provide Ms. Rose with too much parenting time. The only concern that Mr. Lashlee's lawyer expressed was that the provision requiring Ms. Rose to return the children at 8:00 p.m. following their visitation on Tuesday was too close to the children's bedtime. The trial court did not share this concern. On January 10, 2002,

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[1] *In re Name Change of Lashlee*, No. 02P-1242 (Davidson Cir. Order filed July 31, 2002).

[2] Specifically, Mr. Lashlee's lawyer stated:

> He [Mr. Lashlee] agreed initially, and has agreed, that they should see their mother. What he does not agree to is that Ms. Rose, who is progressively seeking to have a 50/50 relationship with the children and Mr. Lashlee, that's what we oppose and still oppose.

following a disagreement regarding the wording of the new parenting plan drafted by Mr. Lashlee's lawyer, the trial court entered an order approving a revised parenting plan that conformed to its ruling from the bench. Mr. Lashlee now appeals from the January 10, 2005 order.

II.

Mr. Lashlee raises only one issue on this appeal. He insists that the trial court erred by modifying the visitation provisions in the existing parenting plan because "no evidence of a material change of circumstances was presented." This assertion, however, is entirely different from Mr. Lashlee's position in the trial court. In his answer to Ms. Rose's petition, he admitted that a material change of circumstances had occurred. Mr. Lashlee's lawyer never asserted during the August 2004 hearing that no material change of circumstances had occurred but rather focused on other aspects of the revisions to the visitation arrangement.

Except for the circumstances addressed in Tenn. R. App. P. 13(b), this court customarily declines to consider claims and arguments that were not presented to the trial court. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991); *Williamson County Broad. Co. v. Intermedia Partners*, 987 S.W.2d 550, 553 (Tenn. Ct. App. 1998). Similarly, we decline to permit parties to make arguments on appeal that are diametrically opposed to the arguments they made in the trial court. *Marcus v. Marcus*, 993 S.W.2d 596, 602 (Tenn.1999); *Obion County v. McKinnis*, 211 Tenn. 183, 186, 364 S.W.2d 356, 357 (1963); *Webber v. Webber*, 109 S.W.3d 357, 359 (Tenn. Ct. App. 2003).

The matters at issue on this appeal do not implicate Tenn. R. App. P. 13(b). There is no dispute that the arguments Mr. Lashlee is making on this appeal regarding the absence of a material change of circumstances are diametrically different than the position he took in the trial court. No evidence regarding the existence of a material change of circumstances was required because Mr. Lashlee had admitted in his answer that the circumstances had changed since the entry of the parenting plan. When the allegations in a complaint are admitted in the answer, the subject matter of the allegations is removed as an issue, and no further proof is necessary. *Rast v. Terry*, 532 S.W.2d 552, 554 (Tenn. 1976); *King v. Dunlap*, 945 S.W.2d 736, 740 (Tenn. Ct. App. 1996); *Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn. Ct. App. 1988). Accordingly, we decline to consider the substantive issue raised by Mr. Lashlee on this appeal.[3]

[3] Had we addressed the issue raised by Mr. Lashlee, we would have concluded that the record contains evidence of changes in children's and parties' circumstances that qualify as a material change of circumstances under Tenn. Code Ann. § 36-6-101(a)(2)(C) (2005). The statute sets a very low threshold for establishing a material change of circumstances. Indeed, merely showing that the existing arrangement has proven unworkable for the parties is sufficient to satisfy the material change of circumstance test. *Rushing v. Rushing*, No. W2003-01413-COA-R3-CV, 2004 WL 2439309, at *6 (Tenn. Ct. App. Oct. 27, 2004) (No Tenn. R. App. P. 11 application filed); *Turner v. Purvis*, No. M2002-00023-COA-R3-CV, 2003 WL 1826223, at *4 (Tenn. Ct. App. Apr. 9, 2003) (No Tenn. R. App. P. 11 application filed); *Vaccarella v. Vaccarella*, 49 S.W.3d 307, 318 (Tenn. Ct. App. 2001); *Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn. Ct. App. 1998).

III.

We affirm the January 10, 2005 order modifying the parties' permanent parenting plan and remand the case to the trial court for whatever further proceedings consistent with this opinion may be required. We also tax the costs of this appeal to Christopher Stanley Lashlee and his surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.